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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ANTONY BROWN, *et al.*,
Petitioners,

v.

PRO FOOTBALL, INC.,
d/b/a WASHINGTON REDSKINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE NATIONAL RAILWAY LABOR CONFERENCE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF OF THE NATIONAL RAILWAY LABOR CONFERENCE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

This *amicus* brief is being filed with the written consent of the parties pursuant to Rule 37.3 of this Court.

INTEREST OF AMICUS CURIAE AND SUMMARY OF ARGUMENT

The National Railway Labor Conference (NRLC) is an unincorporated association that includes among its members all of the nation's Class I freight railroads. Among other things, the NRLC (through its National Carriers' Conference Committee) represents member railroads in multi-employer collective bargaining under the Railway Labor Act (RLA). Multi-employer bargaining in the railroad industry, commonly referred to as "national handling," antedates the enactment of the RLA in 1926, and at least since 1931 has occurred in consecu-

tive "rounds" of general wage and rules movements up to and including the present day. The preservation of the railroads' right to bargain on a multi-employer basis is of critical importance, therefore, to the NRLC and member railroads and to effective collective bargaining under the RLA.

The utility and success of multi-employer bargaining in the railroad industry, as in industries subject to the National Labor Relations Act (NLRA), would be crippled if not destroyed altogether if it does not include the right of the employers to mutually engage in self-help in support of their common bargaining proposals, if and when resort to such self-help is permissible under the applicable labor statute, without running the risk of violating the Sherman Antitrust Act and subjecting themselves to treble damages and even criminal punishment.

Although this case has arisen under the NLRA, as the Court has noted, the courts "have referred to the NLRA for assistance in construing" the RLA. *Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369, 383 (1969). But the Court also emphasized that the NLRA "cannot be imported wholesale into the railway labor arena," and even "rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes." *Ibid.* We believe that the Court of Appeals correctly held that a multi-employer promulgation, after an impasse in multi-employer bargaining under the NLRA, is exempt from the antitrust laws. Hence, we urge the Court to affirm the Court of Appeals essentially for the reasons stated by that Court and by respondents.

We do not here repeat or elaborate at length upon those arguments, but rather primarily demonstrate that there are even stronger reasons in the scheme of the RLA and the history of multi-employer bargaining thereunder to uphold an antitrust exemption for a multi-employer promulgation of multi-employer proposals. Among other things, as we shall demonstrate, the RLA expressly authorizes a "group of carriers" to designate a common bar-

gaining agent to bargain on their behalf (45 U.S.C. § 151 Sixth), and this Court has upheld the right of a multi-employer group of railroads to promulgate their proposals following exhaustion of the procedures required by the RLA. *Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284 (1963). Consequently, we urge the Court, particularly if it should reverse the decision below, to make clear in its opinion that its decision is limited to a multi-employer promulgation under the NLRA and is not intended to cast any doubt upon the *Locomotive Engineers* decision or otherwise upon the validity of a multi-employer promulgation under the RLA.

ARGUMENT

Although the NLRA does "not expressly authorize or deal with multiemployer units," *Charles D. Bonanno Linen Service* v. *NLRB*, 454 U.S. 404, 409 (1982), the Court consistently has recognized the value of multi-employer bargaining to promote labor peace. Among other things, the Court pointed out in *Labor Board* v. *Truck Drivers Union*, 353 U.S. 87, 94-95 (1957), and reiterated in *Bonanno* that:

> ". . . multiemployer bargaining had 'long antedated the Wagner Act' and had become more common as employers, in the course of complying with their duty to bargain under the Act, 'sought through group bargaining to match increased union strength.' 353 U.S. at 94-95 (footnote omitted). Furthermore, at the time of the debates on the Taft-Hartley amendments, Congress had rejected a proposal to limit or outlaw multiemployer bargaining. The debates and their results offered 'cogent evidence that in many industries multiemployer bargaining basis was a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining.' *Id.*, at 95."

454 U.S. at 409. In short, multi-employer bargaining "offers advantages to both management and labor"; it

also "encourages both sides to adopt a flexible attitude during negotiations" since "employers can make concessions 'without fear that other employers will refuse to make similar concessions to achieve a competitive advantage,' and a union can act similarly 'without fear that the employees will be dissatisfied at not receiving the same benefits which the union might win from other employers.' " 454 U.S. at 409 n.3.

This Court also consistently has upheld the right of a multi-employer group to engage in mutual self-help, when otherwise permissible under the NLRA, to preserve and protect multi-employer bargaining. Thus, *Truck Drivers Union* held that, in response to whipsaw strikes of one or more of the employers engaged in multi-employer bargaining, the others could lock out their employees "as a defense to a union strike tactic which threatens the destruction of the employers' interest in bargaining on a group basis." 353 U.S. at 93. The Court, in *Labor Board* v. *Brown*, 380 U.S. 278 (1965), held that the members of a multi-employer group may both lock out their employees in response to whipsaw strikes and utilize temporary replacements so as to continue to operate. The "compelling inference is that this was all part and parcel of respondents' defensive measures to preserve the multi-employer group in the face of the whipsaw strike." *Id.* at 284.

Moreover, in *Bonanno* the Court held that an impasse in multi-employer bargaining does not justify withdrawal from such bargaining. As the NLRA does not give employers or unions a right to multi-employer bargaining, such bargaining is voluntary under that Act. But, the NLRB "has sought to further the utility of multiemployer bargaining as an instrument of labor peace by limiting the circumstances under which any party may unilaterally withdraw during negotiations." 454 U.S. at 412. An "impasse is only a temporary deadlock or hiatus in negotiations 'which in almost all cases is eventually broken, through a change in mind or the application of economic force,' " so that for this and other reasons "permitting

withdrawal at impasse would as a practical matter undermine the utility of multiemployer bargaining." *Ibid.*[1]

We believe that those decisions in themselves are sufficient to demonstrate that subjecting multi-employer bargaining under the NLRA to the constraints of the Sherman Act after an impasse in bargaining, as the Government urges, much less after the termination of a collective bargaining agreement, as the petitioners urge, would be antithetical to the scheme of the later-enacted NLRA. Indeed, if a multi-employer bargaining agreement would violate the Sherman Act but for the labor exemption, a multi-employer proposal to make such an agreement would do so as well—an agreement among competitors as to what price they will offer to prospective buyers or sellers of goods or services ordinarily is sufficient to establish a violation in a business rather than a labor context.[2] It is difficult to see how multi-employer bargaining could, as a practical matter, be carried on at all if the labor exemption terminates when a labor agreement terminates as that is the point, or only shortly after the point, at which negotiations upon a new agreement ordinarily commence.[3] And, since an impasse in multi-employer bargaining does not terminate the duty to bargain on that basis in a good faith effort to reach a multi-employer agreement, the employers must continue to have the right to make multi-employer offers if they are eventually to

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[1] Although the NLRB has rejected the "proposition that the negotiation of truly interim, temporary agreements, as distinguished from separate, final contracts, is 'inconsistent with the concept of multiemployer bargaining units' "; it "is 'vital' to understand that the Board distinguishes 'between interim agreements which contemplate adherence to a final unitwide contract and are thus not antithetical to group bargaining and individual agreements which are clearly inconsistent with, and destructive of, group bargaining.' " 454 U.S. at 414-415 (citation omitted).

[2] See, *e.g.*, *Mandeville Farms* v. *Sugar Co.*, 334 U.S. 219, 235-236 (1948).

[3] See the *proviso* to § 8(d) of the NLRA, 29 U.S.C. § 158(d).

make a multi-employer labor agreement. Multi-employer imposition of a multi-employer offer after an impasse is "part and parcel" of the employers' efforts to preserve the multi-employer group, and is an "application of economic force" that can break the impasse and lead to a multi-employer labor agreement.

Application of the Sherman Act would be even more antithetical to the statutory scheme of the RLA, 45 U.S.C. §§ 151 *et seq.*, and to multi-employer bargaining thereunder. That Act, "like the National Labor Relations Act, does not undertake governmental regulation of wages, hours or working conditions. Instead, it seeks to provide a means by which agreements may be reached with respect to them." *Terminal Assn.* v. *Trainmen*, 318 U.S. 1, 6 (1943). The RLA "was passed in 1926 to encourage collective bargaining by railroads and their employees in order to prevent, if possible, wasteful strikes and interruptions of interstate commerce. The problem of strikes was considered to be particularly acute in the area of 'major disputes,' those disputes involving the formation of collective agreements and efforts to change them." *Shore Line* v. *Transportation Union*, 396 U.S. 142, 148 (1969).

The RLA thus "provides a detailed framework to facilitate the voluntary settlement of major disputes." *Railroad Trainmen* v. *Terminal Co., supra*, 394 U.S. at 378. The procedures provided in that regard "are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." *Railway Clerks* v. *Florida E.C. R. Co.*, 384 U.S. 238, 246 (1966). Those procedures are succinctly summarized in *Railroad Trainmen, supra*, 394 U.S. at 378, as follows:

> "A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. § 6. The parties must confer, § 2 Second, and if conference fails to resolve the dispute, either or both may invoke the services of the National Medi-

> ation Board, which may also proffer its services *sua sponte* if it finds a labor emergency to exist. § 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. §§ 5 First, 7. If arbitration is rejected and the dispute threatens 'substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President,' who may create an emergency board to investigate and report on the dispute. § 10. While the dispute is working its way through these stages, neither party may unilaterally alter the *status quo*. §§ 2 Seventh, 5 First, 6, 10."

The Court then pointed out that, while the text of the RLA does not "specify what is to take place once these procedures have been exhausted":

> "Implicit in the statutory scheme, however, is the ultimate right of the disputants to resort to self-help—'the inevitable alternative in a statutory scheme which deliberately denies the final power to compel arbitration.' *Florida E.C. R. Co.* v. *Railroad Trainmen*, 336 F.2d 172, 181 (1964). We have consistently so held in a long line of decisions. *Railway Clerks* v. *Florida E.C. R. Co.*, 384 U.S. 238, 244 (1966); *Locomotive Engineers* v. *Baltimore & O. R. Co.*, 372 U.S. 284 (1963); *Railroad Telegraphers* v. *Chicago & N.W. R. Co.*, 362 U.S. 330 (1960); *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 725 (1945)."

394 U.S. at 378-379.

One of the cited cases—that "consistently" held that the "ultimate right . . . to resort to self-help" is "[i]mplicit in the statutory scheme" of the RLA—upheld the right of some 200 railroads to promulgate, as a multi-employer group, their "intended changes in agreements affecting rates of pay, rules, and working conditions" as set forth in their written notices pursuant to § 6 of the RLA, after the major dispute provisions of the RLA had been ex-

hausted in multi-employer bargaining. *Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284, 285, 286, 290-291 (1963). The unions served with those notices sued for a judgment that the proposed rule changes would violate the RLA, but this Court held otherwise. Hence, the "only question" remaining was "whether the record before us sustains the findings of both lower courts that the parties have exhausted the procedures provided by the Railway Labor Act for major disputes such as that involved here." 372 U.S. at 290. As that finding was upheld, the Court sustained the dismissal by the lower courts of the unions' complaint.

Whatever may be the situation under the NLRA, therefore, it is clear under the RLA that a multi-employer group has a right, as a part of the self-help that is implicit in that Act, to impose or promulgate as a group their proposals with respect to rates of pay, rules or working conditions that are mandatorily bargainable under the RLA, if and when the major dispute procedures of the Act have been exhausted in multi-employer bargaining under the Act.[4] As we next show, it could hardly be otherwise in view of the long history of multi-employer bargaining in the railroad industry and the express authorization in the RLA for the designation by a "group" of railroads of a common representative to bargain on their behalf with the representatives of the employees involved.

Multi-employer bargaining in the railroad industry dates back at least to 1915 when numerous carriers appointed a committee to negotiate on their joint behalf with four unions proposing to establish by agreement an 8-hour day. See Harry D. Wolf, *Railroads*, in *How Col-*

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[4] Although not in a multi-employer context, the Court observed, in *TWA, Inc.* v. *Flight Attendants*, 489 U.S. 426, 439 (1989), that its "cases have read the RLA to provide greater avenues of self-help to parties that have exhausted the statute's 'virtually endless' . . . dispute resolution mechanisms than would be available under the NLRA." (Citation omitted.) See, also, *id.* at 442.

lective Bargaining Works in Leading American Industries, 318, 325 (1942). There are numerous mentions of multi-employer bargaining, sometimes on a regional rather than national basis, in the legislative history of the RLA as enacted in 1926. Among other things, Donald Richberg testified (on behalf of rail labor) that no limit was placed on the number of emergency board members as there could be "a national situation involving a great many roads and a great many labor organizations" for which "you might want to creat a very large board . . . ." See 2 *The Railway Labor Act of 1926—A Legislative History*, § 2, at 96 (Michael H. Campbell & Edward C. Brewer, III, eds., 1988).[5]

The 1926 Act did not expressly address multi-employer bargaining. However, the RLA was reenacted with amendments in 1934 that, among other things, provided expressly for such bargaining by adding § 1 Sixth (48 Stat. 1187) under which:

> "The term 'representative' means any person or persons, labor union, organization, or corporation *designated either by a carrier or group of carriers* or by its or their employees *to act for it or them.*"

45 U.S.C. § 151 Sixth (emphasis added). In addition, § 2 Second was revised (48 Stat. 1187) to provide that:

> "All disputes between a carrier *or carriers* and its *or their* employees shall be considered, and if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier *or carriers* and by the employees thereof interested in the dispute."

45 U.S.C. § 152 Second (emphasis added to the words added in 1934).

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[5] The 1926 RLA "was, and was acknowledged to be, an agreement worked out between management and labor, and ratified by the Congress" so "the statements of the spokesmen for the two parties are entitled to great weight in the construction of the Act." *Chicago & N.W. R. Co.* v. *Transportation Union*, 402 U.S. 570, 576 (1971). Mr. Richberg was the spokesman for labor.

These amendments followed the commencement of modern multi-employer bargaining in the railroad industry, in the midst of the Great Depression, under circumstances in which it was crucial for the survival of the industry. In 1932, the major railroads and railway labor unions agreed (after multi-employer negotiations) to wage reductions necessary to carry the railroads through the crisis, which were extended by national agreements in 1933 and 1934. The 1934 agreement also provided for phasing out those wage reductions, and expressed the view of the parties that future general wage movements "should be conducted nationally." Those movements soon were expanded to include other subjects, and since then there has been a series of national wage and rules movements which have resulted in hundreds of national agreements between the participating railroads and union or unions, following multi-employer bargaining.[6]

Hence, a union contention that multi-employer bargaining is dependent upon agreement between the parties to bargain on that basis, as it is under the NLRA, was rejected in *Brotherhood of Railroad Train.* v. *Atlantic Coast Line R. Co.*, 383 F.2d 225, 228-229 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 1047 (1968); although national handling of the particular dispute is not "obligatory" if not compatible with "good faith bargaining in the railroad industry" as commanded by § 2 First of the RLA in the light of the "practical appropriateness of mass bargaining" as shown by the "historical experience in handling any similar national movements." *Id.* at 229.

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[6] These agreements (including the 1932-1934 agreements) are in the files of the NRLC. See, also, Wolf, *supra* at 340; *International Ass'n of M. & A.W.* v. *National Ry. Labor Conf.*, 310 F. Supp. 905, 911-912 (D.D.C. 1970), *appeal dismissed as moot*, 463 F.2d 872 (D.C. Cir. 1972). Collective bargaining agreements in the railroad industry usually do not contain a specific expiration date and continue in effect until changed pursuant to that Act. Instead, they contain what commonly is referred to as a "moratorium" under which proposals for future changes cannot be served under § 6 of the Act or progressed until a specified future date. Thus, a particular general wage and rules movement usually commences when the moratoriums in the last national agreements expire.

That case involved only a discrete crew size issue, as to which there had "never been a national . . . rule" and as to which a presidential board had concluded that "a national prescription of crew size would be wholly unrealistic." *Id.* at 229. But, as we have noted, national handling has been the practice in general wage and rules movements under the RLA since at least 1931 and has resulted in hundreds of national settlements with railroads that have designated a group bargaining representative. No emergency board or other neutral body or court has deemed such multi-employer bargaining to be inappropriate in those circumstances. Rather, Emergency Board No. 98, in recommending national union-shop agreements with the rail labor unions, pointed out that the parties "have repeatedly and consistently recognized national handling as an essential procedure for disposing of national movements on a great diversity of issues covering not merely wages but a wide variety of rules changes . . . ." Report to the President by Emergency Board No. 98 (Feb. 14, 1952) at 57. So, too, the National Mediation Board (which mediates major disputes under the RLA) has commended and encouraged national handling of general wage and rules movements "as in the best interests of the nation in helping to preserve labor peace over an extended period of time" with respect to issues that otherwise could give rise to hundreds of disputes with individual railroads. See its Forty-Fourth Annual Report (1978) at 2; Third Annual Report (1937) at 3.

Accordingly, the court that decided *Atlantic Coast Line* subsequently confirmed that multi-employer bargaining with the representative designated by a "group of carriers" in a general wage and rules movement was obligatory. *Delaware & Hudson Railway Co.* v. *United Transp. Union*, 450 F.2d 603, 608-609, 609-610 n.14 (D.C. Cir. 1971), *cert. denied*, 403 U.S. 911 (1971).[7] The court

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[7] See, also, *International Ass'n of M. & A.W.* v. *National Ry. Labor Conf., supra*, 310 F. Supp. at 911-912; *United Transportation U.* v. *Burlington Northern, Inc.*, 325 F. Supp. 1125, 1131 (D.D.C.

in that case held that, after exhaustion of the major dispute procedures of the RLA, the union could engage in selective strikes for the purpose of coercing a national agreement rather than separate agreements with individual railroads. *Id.* at 611-619. The court pointed out in support of that holding that the carriers' right to self-help includes a multi-employer promulgation:

> ". . . the fact that the present dispute involves a matter subject to national handling means that the carriers may make a national response to defend against a selective strike that jeopardizes national bargaining. *At the very least they could introduce unilaterally on a national basis the work rules they proposed in their Section 6 counteroffer.* And they could impose a national lockout if necessary to defend the principle of national bargaining."

Id. at 614 (emphasis added).[8]

1973); *Chicago Burlington & Quincy R.R.* v. *Railway Emp. Dept.*, 301 F. Supp. 603, 607 (D.D.C. 1969).

[8] The unions sometimes have contended that a railroad which exercises its option under § 1 Sixth and § 2 Second of the RLA to designate an individual representative, rather than a group representative, to bargain on an individual carrier basis, must nonetheless bargain on a multi-employer basis with other railroads that designated a group representative. That contention was rejected in *American Ry. and Airway Sup'rs* v. *Soo Line R. Co.*, 891 F.2d 675 (8th Cir. 1989), *cert. denied*, 489 U.S. 809 (1990), and in *United Transp. Union* v. *Grand Trunk Western R. Co.*, 901 F.2d 489 (6th Cir. 1990), *cert. denied*, 498 U.S. 815 (1990). Those cases relied upon § 2 Third of the RLA which "expressly preserves each party's right to choose its own bargaining representative," 901 F.2d at 490, although withdrawal from national handling after bargaining had commenced would be inconsistent with § 2 First. That rationale also supports the view that refusal of a union to bargain with a representative designated by a group of carriers to bargain on a multi-employer basis also would be inconsistent with § 2 Third. And since the national or international union, rather than a local or other subordinate unit, is certified by the National Mediation Board under § 2 Ninth of the RLA to bargain on behalf of employees, requiring a national union to bargain on a multi-employer basis does not contravene § 2 Third. See, *e.g.*, *Neal* v. *System Bd. of Adjustment*, 348 F.2d 722 (8th

Since the *Delaware & Hudson* decision (as before), the railway labor unions have consistently bargained on a multi-employer basis with the railroads that have designated a common "group" representative to bargain on that basis in every round of general wage and rules movements.[9]

We submit, therefore, that multi-employer bargaining under the RLA is firmly grounded in the language of that Act and is a practice that has been followed consistently since 1931 and occurred even prior to the RLA. It also is clear that the right of the railroads to impose their proposals in such bargaining, on a multi-employer basis, after exhausting the Act's procedures in multi-employer bargaining, is implicit in the scheme of

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Cir. 1965); *American Train Dispatchers Ass'n* v. *Union Pacific R.R.*, 679 F. Supp. 1535, 1543 (W.D. Mo. 1987). The *Soo Line* decision noted that the unions have the option of bargaining on an individual union or multi-union basis. 891 F.2d at 679. Both options have been exercised in the past. Thus, under the statutory scheme of the RLA, unlike the NLRA, unions may insist on bargaining together as a group and carriers may likewise insist on bargaining together as a group, subject to the requirements of § 2 First. The Court need not dwell on these matters, however, as the case before it concerns only bargaining under the NLRA. Our point is simply that there are important differences in the statutory schemes of the RLA and the NLRA with respect to multi-employer bargaining.

[9] The only exception is that two (of the 11) national unions currently party to such a movement are contending that they have a right under the RLA to bargain on an individual railroad basis. That contention, and the carriers' contention that national handling is obligatory, is now pending on cross-motions for summary judgment before Judge Hogan on the United States District Court for the District of Columbia. In *Alton & Southern Railway, et al.* v. *Brotherhood of Maintenance of Way Employes*, Civil Action No. 94,2365, as to that union; and in consolidated cases, *International Brotherhood of Locomotive Engineers, et al.* v. *Consolidated Rail Corporation, et al.*, Civil Action No. 95-0020, and *Atchison, Topeka & Santa Fe Railway, et al.* v. *International Brotherhood of Locomotive Engineers*, Civil Action No. 95-0387, as to that union.

the RLA. Hence, to subject such multi-employer bargaining and multi-employer promulgations under the RLA to the constraints of the antitrust laws would be antithetical to the scheme of the later-enacted RLA, whatever might be the case with respect to the NLRA.

CONCLUSION

The decision and judgment by the Court of Appeals should be affirmed, but even if it should be reversed the Court should make clear that its decision is not intended to apply under the RLA or to cast any doubt upon its decision in *Locomotive Engineers* v. *B. & O. R. Co.*, *supra*, upholding a multi-employer promulgation of the railroads' proposals following the exhaustion of the major dispute procedures of the RLA.

Respectfully submitted,

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